

IN THE
Supreme Court of the United States
October Term, 1975

Supreme Court, U. S.

FILED

27 1976

MICHAEL RODAK, JR., CLERK

No. 76-11

DAVID HALL,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

MALCOLM R. OYLER
JOHN ROMIG SMITH
100 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

LOUIS NIZER
40 West 57th Street
New York, New York 10019

LAWRENCE S. LESSER
1800 M Street, N. W.
Washington, D. C. 20036

Counsel for Petitioner

OYLER & SMITH
100 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019

Of Counsel



TABLE OF CONTENTS

	PAGE
Opinions Below	1
Argument	2
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bain, Ex parte, 121 U.S. 1 (1887)	2, 3, 4
Morissette v. United States, 342 U.S. 246 (1952)	5
Nebraska Press Association v. Stuart, — U.S. —, 96 S.Ct. 2791 (1976)	8
Russell v. United States, 361 U.S. 212 (1960)	2, 4
Salinger v. United States, 272 U.S. 542 (1926)	3
Stirone v. United States, 361 U.S. 212 (1960)	2, 4

United States Constitution:

Fifth Amendment	4
-----------------------	---

Statute:

Hobbs Act, Tit. 18 U.S.C. §1951	4, 5
---------------------------------------	------

Federal Rules of Criminal Procedure:

7(d)	2, 3, 4
43(a)	7

IN THE
Supreme Court of the United States
October Term, 1975

No. 76-11

DAVID HALL,

Petitioner,

v.

UNITED STATES OF AMERICA.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

REPLY BRIEF FOR PETITIONER

Opinions Below

Since the filing of the petition, the opinion of the United States Court of Appeals for the Tenth Circuit, Hall Pet. 1a-35a, has been reported at 536 F.2d 313.

Argument

The government's brief in opposition to the Hall petition, No. 76-11, is, palpably, a barren exercise in gloss and obfuscation in each of the six points comprising its argument. Opp. Br. 3-8. Thus, point by point—

1. In its first point, Opp. Br. 3, 4, in answer to petitioner's second point, Hall Pet. 15-24, the government treats with the district court's gross tinkering with the substance of the indictment (which the court below sanctioned) in legal effect, to amend it by deletion; but not once in that compelling context does the government mention *Bain*,¹ as though this Court had never decided that case, nor expressly reaffirmed it in *Stirone*² and, again, in *Russell*.³ Hall Pet. 19-24. Similarly, the government utterly ignores the existence of Rule 7(d), F.R.Crim.P., promulgated by this Court. Hall Pet. 21, 22. These decisions and rule are plainly applicable and governing here, and much as the government might wish to, it cannot make them "go away" by hiding its head in the sand. Nor does the government's silence lessen one whit what it would thereby gloss over, that in the presence of such decisions and rule, the district court's action was a patently impermissible violation of the petitioner Hall's Fifth Amendment right to be tried not otherwise than on an indictment by a grand jury. The government's tactic of silence cannot obscure the reality that the district court's action, and the affirmance by the

1. *Ex parte Bain*, 121 U.S. 1 (1887).

2. *Stirone v. United States*, 361 U.S. 212, 215, 216 (1960).

3. *Russell v. United States*, 369 U.S. 749, 770 (1962).

court below, fly in the face of Rule 7(d), and are in utter conflict with this Court's decision in *Bain*.

Curiously, the government argues, p. 4, that by its deletion "the trial court did no more than withdraw a charge from the jury's consideration, and it is not material whether it did so as a deletion of surplusage or because it did not believe that the charge would be sustained by the evidence." But, while the government perceives no material difference between the two alternatives it posits, in *Salinger*⁴, Hall Pet. 22, 23, this Court held that there was a most material difference between the two. Furthermore, so far as concerns the second alternative, the trial court did its "deleting" before either the prosecution or the defense had made its opening statement to the jury. Hall Pet. 16. Accordingly, the trial court could have had no basis for believing whether or not the charge he deleted "would be sustained by the evidence". And, so far as concerns deleting the charge as "surplusage", *Bain*, and Rule 7(d), F.R.Crim.P., make it plain beyond all doubt, that such action can be taken, if at all, *only* on the defendant's motion. Hall Pet. 21, 22.

Equally curiously, the government urges, p. 4, in support of its position that the deletion from the indictment did not prejudice petitioner, that the "grand jury necessarily found that probable cause existed to warrant" inclusion in the indictment of both charges of violations of the Oklahoma statutes—the one the trial court left standing, as well as the one it deleted. If that be so, by what authority, one may ask, could the district court determine that one charge

4. *Salinger v. United States*, 272 U.S. 542, 548 (1926).

was surplusage and the other was not? In *Bain*, this Court held that there was no such authority. And, in *Bain* and *Stirone*, too, this Court gives the short answer to the government's argument that the deletion did not "prejudice" the petitioner. Hall Pet. 23, 24; 10, 20. *Cf.* Hall Pet. 16, 17.

In view of the force and clarity of *Bain*, *Stirone* and *Russell*, and the stern limitation of the first sentence of the Fifth Amendment, and of Rule 7(d) F.R.Crim.P., it is not surprising that the government chose not to tangle with them. But, having so chosen, it may respectfully be suggested that the appropriate course for the government to take, was, and still is, to confess error in this aspect of the case, and not to whistle in the dark, hopeful that the matter will be overlooked.

2. In its second point, Opp. Br. 4, 5, which is in answer to petitioner's first point, Hall Pet. 7-15, the government treats with the meaning to be ascribed to the phrase in Hobbs Act "under color of official right", wholly without advertng to the legislative history of the Act. Accordingly, the government utterly ignores the plain fact, shown by the legislative history, that the phrase was expressly taken, *with its meaning*, from New York legislation, where it had a fixed meaning, which was, in turn, derived from the prior common law. Hall Pet. 9-11; fn. 7, p. 15; 81a-85a. It is this meaning for which the petitioner Hall contends. Strangely, the government argues that to give the phrase as used in the Hobbs Act, the same meaning it had in the New York Penal Law from which it was taken, as the sponsors of the Act expressly intended, Hall Pet. 9, "would unjustifiably eviscerate the Act and create a loophole not intended by Congress." Opp. Br. 5. This is sheer *ipsi*

dixit, for which the government cites, and can cite, *no* support whatsoever in the legislative history of the Act. On the contrary, the legislative history is crystal clear that the Congress *understood* and *intended* that as used in the Hobbs Act, the phrase had, and would have the same meaning as it had in the New York legislation, and no other. Hall Pet. 9. The Congressional intent as authoritatively shown by the printed pages of the Congressional Record stands in sharp contrast with the Congressional intent as somehow divined by the government.

The government supports what the court below and other Courts of Appeals have done, Hall Pet. 12-14, Opp. Br. 5, that is, to expand the meaning of the phrase as used in the Hobbs Act, far beyond the meaning it had in the New York legislation. Hall Pet. 9-11. However, any such judicial expansion of the meaning of the phrase, is, necessarily, in head-on conflict with the salutary principle announced by this Court in *Morissette*⁵. Hall Pet. 12. The government deals with *Morissette* by not mentioning it, just as though it did not exist. But, this Court's decision in *Morissette*, no more than its decisions in *Bain*, *Stirone* and *Russell*, *supra*, pp. 2-4, is ~~not~~ so easily "swept under the rug".

3. In its third point, Opp. Br. 5, 6, in answer to petitioner's third point, Hall Pet. 24-40, the government treats with the matter of the drug-ingesting juror, Hall Pet. 24-40, shrugging it off by merely observing, Opp. Br. 6, that "[t]he district court found * * * that 'the juror was capable of rendering satisfactory jury service' ", that the court

5. *Morissette v. United States*, 342 U.S. 246 (1952).

of appeals “correctly sustained that finding”, that there is “no reason for this Court further to review this factual issue.”

But this is skimmed milk masquerading as cream. For, while the trial judge purported to make his finding on what the juror’s doctor had told him, Hall Pet. 27, 29-30, it was actually based on the trial judge’s own *ex cathedra* version of what was said in an *ex parte* telephone conversation between himself and the doctor, the essential content of which was disputed by the doctor, sworn as a witness. Hall Pet. 28, 29. And, the trial judge, in denying petitioner’s renewed motion for a mistrial, nevertheless adhered to his prior decision, although he confessed that he had been unaware that the juror had taken valium, a tranquilizer, an hour and a half before she rejoined the jury in its deliberations pursuant to his direction. Hall Pet. 27, 30-34. The juror, herself, had no doubt that her ingestion of drugs had adversely affected her ability to serve. Hall Pet. 36; fn. 10, 36.

In the circumstances, the trial judge’s finding that the juror was fit, was a bald abuse of his judicial function, and neither his action, nor its sanctioning by the court below, commends the government’s conclusion, Opp. Br. 6, that there is no reason for this Court to review this issue.

4. In its fourth point, Opp. Br. 6, 7, in response to petitioner’s fourth point, Hall Pet. 40-42, the government treats with the trial judge’s engagement *ex parte* in a telephone conversation with the doctor of the hospitalized juror, and through him with the juror. Continuing to pursue its strategy of sidestepping the issues by silence,

the government nowhere considers such action by the trial judge in the light of Rule 43(a), F.R.Crim.P., Hall Pet. 40, 41, which it does not even mention. The government is content to adopt the conclusions of the court below. Opp. Br. 6. But these do not reach the nub of the matter—the *ex parte* character of the trial judge's communications with the juror's doctor and through him with the juror. Hall Pet. 39.

The proof of the pudding is in the eating, and not only did the judge and the doctor disagree as to what was said in a most material particular, Hall Pet. 28, 29, but in his earlier reporting of the conversation to counsel, the judge appears to have omitted another most material particular, if the doctor's recollection is correct. Hall Pet. 38. The trial of a criminal case should *not* involve disputes between the judge and a witness (for that, indeed, is what the doctor was) concerning what was said between them *ex parte*. The command of Rule 43(a) is clear, and neither the government nor the court below advanced any reason whatsoever why it could not and should not have been obeyed.

The government argues, Opp. Br. 6, 7, that in consequence of the hearing which followed (at petitioner's insistence) "any error related to the communication itself could not have affected the petitioner's substantial rights." But, the hearing merely served to bring the error to light, and to permit the plumbing of its depth. Hall Pet. 25-27. It did not serve to cure it. Nor did it serve to protect the petitioner from the consequential infringement of his substantial right to a fair trial. Hall Pet. 40.

5. In its fifth point, Opp. Br. 7, 8, in answer to petitioner's fifth point, Hall Pet. 42-49, the government treats with the district court's *voir dire* of prospective jurors.

Notwithstanding that the adverse pretrial publicity had reached every member of the panel examined, Opp. Br. 8; Hall Pet. 45, the government argues that the perfunctory questions put to the jurors on the *voir dire* were within the "sound discretion" of the district judge. Opp. Br. 7. But the court's questions were not of a kind calculated to invoke answers from which the court could itself objectively evaluate the juror's impartiality. Rather, they left to each juror the subjective assessment of his own impartiality. Hall Pet. 43, 44. Accordingly, on the very face of it, they were not the *searching* questions of which this Court speaks in *Nebraska Press Association v. Stuart*, — U.S. —, 96 S.Ct. 2791, 2805 (1976). The failure of the district court to propound such questions, which the court below sanctioned, was not an exercise of sound discretion, but rather an abuse of discretion. The court below itself recognized that in the circumstances of this case, it might have been "better practice" for the trial judge to have conducted the *voir dire* differently, Hall Pet. 44, but neither the court below nor the government ventures to suggest why the petitioner, whose liberty is at stake, can be denied the benefit of the "better practice".

6. In its sixth point, Opp. Br. 8-10, in response to petitioner's sixth point, Hall Pet. 49-54, the government treats with the prosecutor's unrestrained exploitation of the guilty plea of the co-defendant Mooney, who appeared as a prosecution witness. In its treatment of this matter, the government reduces almost to banality the virulence of the prosecutor's examination, cross-examination and summation. Opp. Br. 8, 9; Hall Pet. 50-54. And, in considering the trial judge's charge, the government seems once again to divine what the printed page does not show. Opp. Br. 9; fn. 5, p. 9; Hall Pet. 54. But in the face of the prosecutor's conduct, as the record shows it, Hall Pet. 50-54, the court's

charge, even as the government would reconstruct it, was manifestly too perfunctory and too general, by accepted standards, to convey^{To} the jury the clear and incisive admonition the circumstances required. Hall Pet. 50.

Conclusion

The petition herein should be granted.

Respectfully submitted,

MALCOLM R. OYLER
JOHN ROMIG SMITH
100 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

LOUIS NIZER
40 West 57th Street
New York, New York 10019

LAWRENCE S. LESSER
1800 M Street, N. W.
Washington, D. C. 20036

Counsel for Petitioner

OYLER & SMITH
100 Investors Capital Bldg.
Oklahoma City, Oklahoma 73102

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019

Of Counsel

October 27, 1976*

* The petition herein was filed July 8, 1976. The government's brief in opposition to which this is petitioner's reply, was filed during the latter part of the afternoon of Friday, October 22, 1976. Monday, October 25, 1976, was Veterans' Day, and it was only during the morning of October 26, 1976, that petitioner's attorneys learned of the immediacy with which any reply thereto would have to be filed.